In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1497

WISCONSIN BEARING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. The Board found that the Company violated Section 8(a)(1) of the National Labor Relations Act by interrogating employees concerning their and other employees' union activities (Pet. App. 8a-12a); promising and granting wage increases and other benefits (Pet. App. 29a-31a); withholding wage reviews and increases (Pet. App. 29a-31a); urging its employees to select a collective bargaining representative other than the Union[1] (Pet. App. 23a-24a); stating that, with union representation, the employees could no longer deal directly with the Company (Pet. App. 29a); and threatening to engage, and engaging, in surveillance of union activities (Pet.

[1] United Electrical, Radio and Machine Workers of America (UE).

App. 12a-15a). The Board found that the Company further violated Section 8(a)(1) by threatening to close its machine shop and plant, and to remove operations to its other branches in the event of a strike (Pet. App. 27a-28a); that unionization would result in loss of customers, layoffs, discharges, and bankruptcy (Pet. App. 27a-28a); that a union-forced strike was inevitable and would result in verbal and physical abuse to non-strikers (Pet. App. 28a). In addition, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by laying off seven employees for engaging in union activity, and by laying off employee Barbara Neary in order to camouflage the layoffs of known union supporters (Pet. App. 31a-42a). Finally, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain collectively with the Union.

The Board ordered the Company to cease and desist from the unfair labor practices found and from infringing "in any other manner" upon its employees' exercise of the rights guaranteed in Section 7 of the Act (Pet. App. 51a-52a). The Board also ordered the Company to bargain with the Union upon request and to offer eight employees reinstatement with backpay (Pet. App. 52a-53a). The court of appeals enforced the Board's order (Pet. App. 67a).

2. Except as noted in "3" below, petitioner does not directly challenge the Board's findings that it violated Section 8(a)(1), (3), and (5) of the Act. Rather, its basic contention is that it was denied due process of law because the Administrative Law Judge, in his decision, failed to list, for each allegation in the complaint, the testimony which supported it (Pet. App. 7a-9a). This objection was not presented to the

Board in the Company's exceptions to the Administrative Law Judge's decision, and thus judicial review thereof is foreclosed under Section 10(e), 29 U.S.C. 160(e), of the Act.[2] *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255-256. In any event, since the Judge coupled his findings with discussions of the specific evidence upon which they were based (see, *e.g.*, Pet. App. 8a-11a, 31a-42a), he considered petitioner's evidence and indicated his reasons for accepting or rejecting it. He is not required to go further and relate the testimony upon which he relied to each of the allegations of the complaint.

3. Petitioner also contends (Pet. 9-10) that a written speech read to the employees by General Manager Werner was not coercive, but merely a legitimate expression of opinion. However, the Administrative Law Judge correctly found (Pet. App. 25a-29a) that the speech constituted threats of reprisal under the standards enunciated in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 597-598, 617-620.

4. Finally, petitioner contends (Pet. 10-11) that the court of appeals should have considered employee turnover in determining whether the Board's bargaining order was proper. Since petitioner did not raise this issue before either the Board or the court below, it cannot raise that issue now.[3]

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[2] The Company merely urged before the Board that the Judge's unfair labor practice findings were not supported by the evidence and were contrary to the law (Court of Appeals App. 81-90).

[3] In any event, *National Labor Relations Board* v. *American Cable Systems, Inc.*, 427 F. 2d 446 (C.A. 5), certiorari denied, 400 U.S. 957, upon which petitioner relies (Pet. 10), can be read as resting on the circumstance, absent here, that it involved a remand to the Board for additional findings in light of *Gissel*, *supra* (see 427 F. 2d at 448). Cf. *National Labor Relations Board* v. *Kaiser Agricultural Chemicals*, 473 F. 2d 374, 384-385 (C.A. 5).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1973.

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